
OPINION OF THE PUBLIC ACCESS COUNSELOR

WARREN A. AUXIER
Complainant,

v.

CITY OF MADISON
Respondent.

Formal Complaint No.
21-FC-23

Luke H. Britt
Public Access Counselor

BRITT, opinion of the counselor:

This advisory opinion is in response to a formal complaint alleging the City of Madison violated the Access to Public Records Act.¹ Attorney William Joseph Jenner filed an answer on behalf of the city. In accordance with Indiana Code

¹ Ind. Code § 5-14-3-1-10.

§ 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on February 17, 2021.

BACKGROUND

This case involves a dispute over access to records involving a complaint related to the pending removal of a board member.

On January 25, 2021, Warren Auxier (Complainant) sent a public records request to Madison Mayor Bob Courtney requesting the following:

- a) All documents Visit Madison Inc.'s President, Executive Director, or Staff members provided to the City of Madison regarding the removal of Tami Hagemier from the Jefferson County Board of Tourism.
- b) All documents the Indiana Office of Community and Rural Affairs provided to the City of Madison regarding the application and selection process used for determining the recipients of grants or loans from the Jefferson County COVID Recovery Small Business Economic Development Program.
- c) All documents the City of Madison is going to be present to the Madison City Council for consideration of the removal of Tami Hagemier from the Jefferson County Board of Tourism for cause.
- d) All emails exchanged between Mayor Courtney and VMI's Executive Director, Tawana Thomas, regarding the application and selection process used for determining the recipients of grants or loans from the Jefferson

County COVID Recovery Small Business Economic Development Program. The date range for this request is September 15, 2020 thru January 25, 2021.

- e) All emails exchanged between Mayor Courtney and VMI's President, Lucy Dattilo, regarding the application and selection process used for determining the recipients of grants or loans from the Jefferson County COVID Recovery Small Business Economic Development Program. The date range for this request is September 15, 2020 thru January 25, 2021.
- f) All emails exchanged between Mayor Courtney and VMI's Executive Director, Tawana Thomas, regarding the removal of Tami Hagemier from the Jefferson County Board of Tourism. The date range for this request is September 15, 2020 thru January 25, 2021
- g) All emails exchanged between Mayor Courtney and VMI's President, Lucy Dattilo, regarding the removal of Tami Hagemier from the Jefferson County Board of Tourism. The date range for this request is September 15, 2020 thru January 25, 2021.
- h) All emails exchanged between City Council President Kathleen Rampy and VMI's Executive Director, Tawana Thomas, regarding the application and selection process used for determining the recipients of grants or loans from the Jefferson County COVID Recovery Small Business Economic Development Program. The date range for this request is September 15, 2020 thru January 25, 2021.

- i) All emails exchanged between City Council President Kathleen Rampy and VMI's President, Lucy Dattilo, regarding the application and selection process used for determining the recipients of grants or loans from the Jefferson County COVID Recovery Small Business Economic Development Program. The date range for this request is September 15, 2020 thru January 25, 2021.
- j) All emails exchanged between City Council President Kathleen Rampy and VMI's Executive Director, Tawana Thomas, regarding the removal of Tami Hagemier from the Jefferson County Board of Tourism. The date range for this request is September 15, 2020 thru January 25, 2021
- k) All emails exchanged between City Council President Kathleen Rampy and VMI's President, Lucy Dattilo, regarding the removal of Tami Hagemier from the Jefferson County Board of Tourism. The date range for this request is September 15, 2020 thru January 25, 2021.

On February 3, 2021, Mayor Courtney responded to Auxier's request. The mayor denied access to items (a) and (c) of the request on the basis that it was protected by attorney client privilege communication and attorney work product in accordance with Indiana Code section 5-14-3-4(a)(1).

As for item (b), the mayor asserted that he had not received any relevant documents. For the remaining items (d) through (k), Mayor Courtney responded that he was not in possession of any of the requested records.

After receiving the mayor's response, Auxier sent another public records request, and this time he addressed it to the city attorney Joe Jenner. Auxier requested the following:

- a) All documents Visit Madison Inc.'s President, Executive Director, or Staff members provided to you regarding the removal of Tami Hagemier from the Jefferson County Board of Tourism.
- b) All documents the Indiana Office of Community and Rural Affairs provided to you regarding the application and selection process used for determining the recipients of grants or loans from the Jefferson County COVID Recovery Small Business Economic Development Program.
- c) All emails you received from VMI's Executive Director, Tawana Thomas, regarding the application and selection process used for determining the recipients of grants or loans from the Jefferson County COVID Recovery Small Business Economic Development Program. The date range for this request is September 15, 2020 thru February 3, 2021.
- d) All emails you have received from VMI's President, Lucy Dattilo, regarding the application and selection process used for determining the recipients of grants or loans from the Jefferson County COVID Recovery Small Business Economic Development Program. The date range for this request is September 15, 2020 thru February 3, 2021.
- e) All emails you have received from VMI's Executive Director, Tawana Thomas, regarding the removal of Tami Hagemier from the Jefferson County Board of Tourism. The date range for

this request is September 15, 2020 thru February 3, 2021.

- f) All emails you have received from VMI's President, Lucy Dattilo, regarding the removal of Tami Hagemier from the Jefferson County Board of Tourism. The date range for this request is September 15, 2020 thru February 3, 2021.

Attorney Jenner responded to Auxier's request on the same day. Jenner denied access to items (a) and (b), and asserted that he did not possess any documents responsive to items (c) through (f) of the request. Specifically, Jenner argues that items (a) and (b) were exempt from disclosure because as the Madison City Attorney he is not subject to the Access to Public Records as it pertains to documents that he has in his possession that were obtained with the specific purpose of advising his client.

Furthermore, Jenner argues that he is not subject to APRA because he is not a public agency as defined by Indiana Code section 5-14-1.5-2.1. Jenner continued his reasoning for withholding the requested records by again claiming that the materials are: (1) protected by attorney-client privilege and attorney work product; (2) are subject to pending or threatened litigation; (3) are protected by the work product privilege; (4) were developed for use in an executive session; and (5) are personnel files that may or may not be released at the discretion of the city. He also argues the records are subject to pending litigation and should be accessed through the discovery process.

ANALYSIS

1. The Access to Public Records Act

The Access to Public Records Act (APRA) states that “(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information.” Ind. Code § 5-14-3-1. The City of Madison (City) is a public agency for purposes of APRA; and therefore, subject to the law’s requirements. *See* Ind. Code § 5-14-3-2(q). As a result, unless an exception applies, any person has the right to inspect and copy the City’s public records during regular business hours. Ind. Code § 5-14-3-3(a).

Indeed, APRA contains exemptions and discretionary exceptions to the general rule of disclosure. *See* Ind. Code § 5-14-3-4(a); -(b).

2. Auxier’s request

For additional context, the City of Madison appoints three members of the Jefferson County Board of Tourism. The Mayor has one appointment and the County has three others. One of the members appointed by the City Council is subject to the pending removal. To the knowledge of this office, there is no statutory or ordinance-based due process right giving the removed member an administrative or civil cause of action. Any fact-finding or hearing appears to be a courtesy. By-laws of the governing body were not provided and cannot be found.

Based on telephone conversations with the parties, it appears as if complaints were lodged against the suspended

tourism board member. For reasons unknown, documentation of the complaints were submitted to the City Attorney. Complainant sought the documentation from the City and then from the City Attorney. Other than what has been noted above, there is no denial certain documents actually exist.

3. Contracted attorneys

Both city executives and city legislative bodies can contract with attorneys to advise and represent them in the course of their municipal duties.² Jenner is known to be the City Attorney, but it is unclear what legal relationship he has, if any, with the Madison City Council.

In any case, the complaints about the board member were received by the City Attorney directly and were not received by the Council or the Mayor's office.

Here's where things get confusing. There can be no doubt that a private attorney in his private capacity is not a public agency as defined by Indiana Code section 5-14-3-2. However, when contracted by a municipality to perform work germane to public business, documentation generated as a result of that work becomes public record. Those records, unless an exception applies, become subject to disclosure.

And while some of those exceptions may or may not be applicable here in, it stands to reason that the exemptions cannot be invoked at all unless there are cited by a public agency or someone authorized to speak on its behalf. A city attorney is very much an agent of a municipality when performing duties in the scope of representation. This comes

² See Ind. Code §§ 36-4-9-11; 36-4-6-24

with the responsibility of responding to records requests as well as enjoying the benefits of exceptions.

Therefore, if a records request is received by a city attorney in the scope of that representation, it is the responsibility of the client (municipality) to respond with production of records or cite an exception to disclosure. This can be done by the attorney at the direction of the client or unilaterally by the city. Some city attorneys around the state are delegated records duties and some remain in-house with the attorney simply advising. Point being that records requests are not a hot potato to pass back and forth between public officials and their lawyers.

In *Knightstown Banner v. Town of Knightstown*, the Indiana Court of Appeals addressed this issue:

Moreover, in light of APRA's purpose of openness, the general assembly crafted the definition of public documents in broad terms. To prevent an agency from frustrating this purpose, the general assembly, in I.C. § 5-14-3-3(g), elected to prohibit a public agency from contracting for storage and copying services that would unreasonably impair access to the public. Thus, if a public agency cannot unreasonably impair access through contractual storage arrangements, accepting Knightstown's argument would amount to a tortured interpretation of APRA whereby private attorneys would be permitted to ensconce government contracts within their firm's file room and completely deny the public access.

838 N.E.2d 1127 (Ind. Ct. App. 2005). This is not to say this office is dismissive of the attorney-client privilege or work

product generally, only that an attorney's office is not a black hole where otherwise disclosable public records escape the gravitational pull of transparency. For instance, the definition of "work product" is not all encompassing:

"Work product of an attorney" means information compiled by an attorney in reasonable anticipation of litigation. The term includes the attorney's:

- (1) notes and statements taken during interviews of prospective witnesses; and
- (2) legal research or records, correspondence, reports, or memoranda to the extent that each contains the attorney's opinions, theories, or conclusions.

Ind. Code § 5-14-3-2(u). As for the complaints about the board member, it does not appear from the information provided that they were compiled in the course of an attorney preparing for litigation. While the list of potential records under subsection (2)(u) is not exhaustive, the manner in which they exist in the custody of an attorney is. "Compiled" is an action verb that contemplates initiated preparation and the development of intellectual property. By all accounts, the complaints themselves were passively received by Jenner and not solicited or invited.

What is more, it is unclear to this office what litigation is implicated here. While the definition of litigation pursuant to the access laws is broad and includes administrative litigation under state or federal law, it does not include informal hearings at the local level that are not statutory in nature (*See e.g.*, Ind. Code § 5-14-1.5-6.1(b)(2)(B)). It is equally unclear what cause of action the removal of an appointed

board member, serving at the pleasure of a city council, would be reasonably anticipated.

4. Executive session

The City also claims the materials requested were specifically prepared for discussion or developed during discussion in an executive session and their release would be discretionary under Indiana Code section 5-14-3-4(b)(12).

First, it is important to note that “specifically prepared,” like “compiled,” is an action verb that should be narrowly defined accordingly. It is doubtful that the materials requested were specifically developed exclusively for an imminent executive session.

Second, this office is unconvinced that this situation justifies an executive session. While Indiana Code section 5-14-1.5-6.1(b)(6) applies to employees, it may be a stretch to say it would also apply to appointed board members. A reading of the entirety of the subsection makes it clear that the “individual” referenced is an employee of the public agency:

With respect to any individual over whom the governing body has jurisdiction:

(A) to receive information concerning the individual's alleged misconduct; and

(B) to discuss, before a determination, the individual's status as an employee, a student, or an independent contractor who is:

(i) a physician; or

(ii) a school bus driver.

In Indiana, public employees and public officials are mutually exclusive for the purposes of executive sessions. *See Common Council of City of Peru v. Peru Daily Tribune*, 440 N.E.2d 726, 732 (Ind. Ct. App. 1982).

Therefore, any local due process or fact-finding hearing regarding a board appointee that is conducted by a majority of the council would likely need to be a public proceeding under the Open Door Law.

5. Personnel files

The City also claims the materials would be off-limits as a personnel file in accordance with Indiana Code section 5-14-3-4(b)(8).

Similar to the executive session discussion above, there is a legitimate question as to whether an appointed board member has, or should have, a traditional human resources “personnel file” at all. Subsection 4(b)(8) specifically references the term “public employment.”

For the purposes of this case, however, we can presume that the City has some kind of file on board members that would meet a loose definition of a personnel file.

So even if the City’s argument is true, any formal charges or disciplinary action taken against the board member (such as a suspension), would need to be accompanied by a documented factual basis. Therefore, either way, the City would need to disclose the reason for the suspension, defeating much of the purpose of withholding the requested information.

CONCLUSION

Based on the foregoing, it is the opinion of this office that the statutory exemptions cited by the City of Madison in this case do not apply, and the records requested would likely need to be disclosed.

A handwritten signature in black ink, appearing to read 'L. Britt', with a stylized flourish at the end.

Luke H. Britt
Public Access Counselor